

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

OCT 12 2012

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2012-0247-PR
	)	DEPARTMENT B
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
OLIVER MICHAEL PRYOR,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20062087

Honorable Richard D. Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Respondent

Oliver M. Pryor

Florence  
In Propria Persona

K E L L Y, Judge.

¶1 Petitioner Oliver Pryor seeks review of the trial court's order summarily denying his successive petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Pryor was convicted of two counts of continuous sexual abuse of a child and two counts of furnishing obscene or harmful items to minors. The trial court sentenced him to a combination of consecutive and concurrent prison terms totaling 42.5 years. We affirmed his convictions and sentences on appeal. *State v. Pryor*, No. 2 CA-CR 2008-0375 (memorandum decision filed Oct. 21, 2009). Pryor then sought post-conviction relief, raising a claim of ineffective assistance of trial counsel. The trial court summarily dismissed his petition, and we denied relief on review. *State v. Pryor*, No. 2 CA-CR 2010-0399-PR (memorandum decision filed Apr. 7, 2011).

¶3 Pryor filed a successive notice and petition in October 2011, arguing he was entitled to the effective assistance of Rule 32 counsel and his appellate and Rule 32 counsel had been ineffective for failing to raise a claim that he was not competent to reject a plea offer by the state or to stand trial. He additionally argued his claims of ineffective assistance of counsel and competency required personal waivers and therefore were not subject to preclusion, relying on *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002).

¶4 The trial court summarily denied relief, concluding his underlying competency claim and his claim of ineffective assistance of appellate counsel were precluded pursuant to Rule 32.2(a). The court further determined Pryor's claim of ineffective assistance of Rule 32 counsel was not cognizable under Rule 32. Pryor filed a motion for rehearing, arguing that, pursuant to the United States Supreme Court's recent decision in *Martinez v. Ryan*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1309 (2012), he was

constitutionally entitled to the effective assistance of Rule 32 counsel. The court summarily denied the motion for rehearing.

¶5 In his petition for review, Pryor again argues that, pursuant to *Martinez*, he has a constitutional right to the effective assistance of Rule 32 counsel and the trial court therefore erred in concluding his claim that his Rule 32 counsel had been ineffective was not cognizable under Rule 32.<sup>1</sup> In *Martinez*, the Supreme Court determined:

Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

\_\_\_ U.S. at \_\_\_, 132 S. Ct. at 1320. But the Court did not ground its decision in a constitutional right, instead determining that defendants had an “equitable” right to the effective assistance of initial post-conviction counsel and limited its decision to the application of procedural default in federal habeas review. *Id.* at \_\_\_, 132 S. Ct. at 1315, 1319-20.

¶6 Arizona courts consistently have stated that, for non-pleading defendants like Pryor, there is no constitutional right to counsel in post-conviction proceedings and, thus, despite the existence of state rules providing counsel, a claim that Rule 32 counsel was ineffective is not a cognizable ground for relief in a subsequent Rule 32 proceeding. *See State v. Mata*, 185 Ariz. 319, 336-37, 916 P.2d 1035, 1052 (1996); *State v. Krum*,

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<sup>1</sup>Pryor does not reurge his argument that his claims are not subject to preclusion pursuant to *Smith*.

183 Ariz. 288, 291-92 & n.5, 903 P.2d 596, 599-600 & n.5 (1995); *Osterkamp v. Browning*, 226 Ariz. 485, ¶ 18, 250 P.3d 551, 556 (App. 2011); *State v. Armstrong*, 176 Ariz. 470, 474-75, 862 P.2d 230, 234-35 (App. 1993). Nothing in *Martinez* alters this established law. The trial court did not err in summarily denying Pryor's successive petition for post-conviction relief or his motion for rehearing.

¶7 For the reasons stated, although review is granted, relief is denied.

*/s/ Virginia C. Kelly*  
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VIRGINIA C. KELLY, Judge

CONCURRING:

*/s/ Garye L. Vásquez*  
\_\_\_\_\_  
GARYE L. VÁSQUEZ, Presiding Judge

*/s/ Philip G. Espinosa*  
\_\_\_\_\_  
PHILIP G. ESPINOSA, Judge